IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MFS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 08CV2508
THOMAS A. DILAZARO, et al.,	:	
Defendants.	:	

PLAINTIFF MFS, INC.'S OBJECTION TO COURT'S DECISION NOT TO INSTRUCT JURY REGARDING DELIBERATE INDIFFERENCE

At the charge conference held on Monday, March 1, 2010, the Court determined that it would not instruct the jury regarding the deliberate indifference standard, as the Court had previously indicated that it would in the form of the jury instruction modified by the Court and attached hereto as Exhibit A. The Third Circuit has recognized three standards to satisfy culpability under the "shocks the conscience" requirement. The three standards are: (1) the deliberate indifference standard; (2) the gross negligence or arbitrariness standard; or (3) the intent to cause harm standard. See, e.g., Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008); Patrick v. Great Valley School District, 296 F. Appx. 258, 261-62 (3d Cir. 2008); Sansford v. Stiles, 456 F.3d 298 (3d Cir. 2006). Because there are three standards, the Court must instruct the jury as to the appropriate standard to apply.

The Third Circuit has held, and this Court has held in its September 28, 2009 Opinion, that "where the state actor had ample time for deliberation before engaging in the allegedly unconstitutional conduct, the appropriate standard will be deliberate indifference." See Motion for Reconsideration Opinion, 9/28/09, Docket No. 40, at p. 33, quoting, Patrick v. Great Valley School District, 296 F. Appx. 258, 261-62 (3d Cir. 2008). Applying the Patrick standard, this Court also previously held that the facts of this case require that the deliberate indifference standard be applied:

> Indeed, Defendants cannot argue they lacked "ample time for deliberation" in their actions. To the contrary, MFS asserts a pattern of wrongful conduct spanning approximately seven years. During that time, Defendants were made aware by multiple sources that their conduct may be questionable. Specifically, the EHB Administrative Law Judge, hearing MFS'' appeal of the Field Enforcement Order, informed Defendant DiLazaro that he and his staff were "acting like children" and that he sensed hostility in Defendant Robbins decision to issue the Field Enforcement Order on a Friday evening. (See Complaint and Answer at 56(O).) A Pennsylvania State Representative sent a letter to Defendants expressing concerns about the way MFS was being treated by Defendant DiLazaro and his staff. (See Docket No. 23, Ex. 4, Letter, dated Feb. 21, 2003.) On several occasions, MFS wrote letters to and requested meetings with Defendants to discuss the unfair prejudice they were suffering as a result of Defendants' actions. Despite all of these warnings, Defendants continued to create hurdles to prevent MFS from renewing its Title V permit.

See Motion for Reconsideration Opinion, 9/28/09, at p. 35.

This Court's holding in this regard was the correct one as the Third Circuit has further instructed district courts that the intent to harm standard can only be applied in "hyperpressurized" circumstances where split second decisions are required such as "a high speed car chase." See Patrick v. Great Valley School

District, 296 F. Appx. 258, 261-62 (3d Cir. 2008), citing Sanford v. Stiles, 456 F.3d 298 (3d Cir. 2006). The Third Circuit has also instructed that the gross negligence or arbitrariness standard is applicable only where the state actor has more than a split second to make a decision but less than enough time to make an unhurried judgment. See id.

Based upon these requirements, and the Court having already determined that the pattern of wrongful conduct alleged in this matter spanned approximately 7 years and that the Defendants were made aware by multiple sources during this entire time period that their conduct was questionable and yet continued in their actions, the deliberate indifference standard must be applied as the Defendants had more than sufficient time to make unhurried judgments.

Respectfully submitted,

"s"/Thomas J. Zagami
Thomas J. Zagami
Attorney I.D. No. 07799
THOMAS J. ZAGAMI, P.A.
Suite 650
10500 Little Patuxent Parkway
Columbia, Maryland 21044
(410) 339-6741
(410) 832-5647 (facsimile)

"s"/Wayne C. Stansfield
Wayne C. Stansfield
Attorney I.D. No. 81339
REED SMITH LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, Pennsylvania 19103
215-851-8100

215-851-1420 (facsimile)
Attorneys for Plaintiff

Dated: March 2, 2010

CERTIFICATE OF SERVICE

I, Wayne C. Stansfield, Esquire, certify that a true and correct copy of Plaintiff MFS, Inc.'s Objection To Court's Decision Not To Instruct Jury Regarding Deliberate Indifference has been filed electronically this 2nd day of March 2010, and is available for viewing and downloading from the Federal Court's Electronic Case Files. A copy of the foregoing has been served today upon the following counsel in the manner indicated below:

Randall J. Henzes
Pennsylvania Office of Attorney General
21 South 12th Street
Philadelphia, PA 19107

Douglas G. White
Pennsylvania Department of
Environmental Protection
2 East Main Street
Norristown, PA 19401

Attorneys for Defendants
(via ECF system)

"s"/Wayne C. Stansfield
Wayne C. Stansfield